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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ELDERBERRY HEIGHTS LLC, Plaintiff and Respondent, v. OLD REPUBLIC TITLE COMPANY, Defendant and Appellant.	H036010 (Monterey County Super. Ct. No. M92385)

After a court trial, plaintiff Elderberry Heights, LLC (Elderberry) recovered $500,000 from appellant Old Republic Title Company (Old Republic), the employer of the escrow officer in a construction loan transaction between Elderberry and Cedar Funding, Inc. On appeal, Old Republic contests the finding that it was liable for breach of fiduciary duty, negligence, and breach of contract. We will affirm the judgment.

Background

In relating the history of this dispute we rely in large part on the facts as stipulated by the parties before trial, supplemented by the trial testimony and the trial court's statement of decision. Elderberry was formed in October 2006 by housing developers Garrett Shingu and Leland Underwood, together with Shingu's son, Darian Shingu.

Garrett Shingu[1] was the managing member of Elderberry. Elderberry purchased a 12.77-acre parcel of land in the Oakhurst area of Madera County, where they decided to construct a gated community of 15 single-family homes. Based on their experience in residential property development, Shingu and Underwood believed that the homes would be ready for sale beginning in 2008. The purchase price of the property was $900,000, of which $600,000 was in the form of a promissory note, secured by a first deed of trust to M. Lewis, Inc. Underwood loaned Elderberry $150,000, and Elderberry paid the $150,000 balance plus closing costs.

In order to raise the $2.2 million needed for the purchase of the property and its development, Elderberry initially lined up individual investors. In June 2007, however, it was approached by Ben Compagno, a representative of Cedar Funding, Inc. Compagno told the Elderberry members that Cedar Funding could give Elderberry a construction loan for $1.6 million. On June 27, 2007, they opened escrow at Old Republic. Charlean Marsh, with whom Shingu had done business before, acted as escrow officer for the transaction.

On July 10, 2007, Shingu signed a standard form "Escrow Closing Statement" from Cedar Funding, approved Cedar Funding's escrow instructions, and signed the "Borrower's Instructions" from Old Republic. On July 12 Shingu executed an "Estimated Borrower's Statement" from Old Republic providing that Elderberry would receive cash out of escrow in the amount of $597,057.36.[2] On that same day, however, Old Republic

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[1] Hereafter we will refer to Garrett Shingu as "Shingu," and to Darian Shingu by both first and last names.

[2] On July 9 Shingu had signed an estimated statement, prepared by Old Republic, that erroneously reflected a distribution to Elderberry of $1,366,144.26. That document was replaced two days later by the statement showing $597,057.36 to be released to Elderberry. Shingu signed that document on July 12.

received an amended instruction from Cedar Funding, revising the amount Elderberry would receive at the close of escrow to zero.

Thus, by July 13, 2007, Old Republic had conflicting instructions from Elderberry and Cedar Funding regarding the disbursement: Elderberry's existing instruction was to record the deed of trust and close escrow only if it held $597,057.36 for release to Elderberry, whereas Cedar Funding, through its amended instruction, had authorized no disbursement. Cedar Funding had deposited $155,136.34 into escrow on July 12, 2007.

At some point before July 13 Elderberry was informed by a representative of Cedar Funding that the $1.6 million construction loan was fully funded and available for Elderberry's use after the close of escrow. Neither Shingu nor Underwood had any reason to believe that the entire $1.6 million was not in escrow. No one at Old Republic notified Elderberry of either the amended instruction or the deposit. Nevertheless, the deed of trust securing the $1.6 million loan was recorded that day, July 13, 2007, at 11:23 a.m.

After the recording, Charlean Marsh called Shingu, told him that the deed of trust had been recorded, and asked him to come down to the Old Republic office to sign some additional documents. Shingu and Underwood went to the offices, expecting to receive a check for $597,057.36 from escrow. Instead, Marsh told them that the money was not available at the escrow office; instead, they had to pick up the check directly from Cedar Funding. She said that that was the way Cedar Funding did business, and she asked Shingu to sign an "Amended Borrower's Closing Statement" showing no money due to Elderberry.

At trial, Anita Rubeck, a defense expert on escrow practice, testified that it would be improper for an escrow officer to close escrow without matching instructions; the proper course of action would be to alert the parties to the conflict and ask the parties how they want to proceed. If they agree on any changes, new instructions must be drawn; if they do not agree, the officer must ask them to work out their differences and

return to escrow. Given the hypothetical situation in which Elderberry found itself, Rubeck testified that Marsh's conduct--directing the borrower to sign the amended closing instruction and deal with the lender directly because that is the way it does business-- was improper.

Shingu and Underwood both were "shocked" to learn that they would be receiving nothing, but they believed they had no alternative but to sign the amended statement. After Shingu signed, he and Underwood went to Cedar Funding to pick up the check. There they met with one of Cedar Funding's principals, Dan Nilsen. Nilsen told them that Elderberry could have whatever it wanted, but he persuaded them to take only $300,000 rather than $600,000, as an initial draw, "so that Elderberry would not have to pay interest on the undisbursed funds."

On July 23, 2007, Elderberry received its first draw from Cedar Funding, in the amount of $300,745.21, which it used for architectural and engineering costs, initial site development costs, and application and sewer fees. On September 1, it requested a second draw for $385,000.00 to enable it to start hiring contractors. Cedar Funding, however, funded only $220,550.00 of that request between September 14, 2007 and January 25, 2008. As a result, Elderberry was unable to hire the contractors it needed, and the project came to a standstill.

On February 28, 2008, Shingu and Underwood met with David Nilsen, the president and CEO of Cedar Funding, who told them that Cedar Funding had no more funds for the project. At their request, in April 2008 Cedar Funding provided Shingu and Underwood with a list of investors Cedar Funding had solicited to fund the loan, so that they could go directly to those investors to raise the balance of the loan funds. It was then that they learned that at the close of escrow Cedar Funding had raised only $300,000 of the $1.6 million that it had committed.

On May 26, 2008, Cedar Funding filed for Chapter 11 bankruptcy.[3] Elderberry was unable to secure replacement financing and therefore could not stay current on its note to M. Lewis, Inc. M. Lewis, Inc. then obtained permission from the bankruptcy court to foreclose, and on August 11, 2009, it obtained the property at a trustee's sale.

Elderberry initiated this action against Old Republic on July 18, 2008. Its first amended complaint, filed on June 25, 2009, asserted claims for breach of fiduciary duty, negligence, and breach of contract, all based on Old Republic's having recorded the deed of trust without Cedar Funding's having deposited $597,057.36 into escrow.

The parties agreed to a court trial. They stipulated that Old Republic had breached the standard of care applicable to escrow agents by permitting the $1.6 million deed of trust to be recorded without having the $597,057.36 in escrow to disburse to Elderberry, in accordance with Elderberry's instructions. They further stipulated that Old Republic had *not* breached the standard of care by not requiring Cedar Funding to deposit the entire $1.6 million into escrow. The primary issues at trial were the elements of causation and damages and Old Republic's affirmative defense, that Shingu and Underwood had ratified Charlean Marsh's unauthorized acts. Old Republic maintained that once Elderberry became aware that the money it had expected was not in escrow, it had the opportunity to "disavow and rescind" the loan transaction, but Shingu instead signed the July 13, 2007 amendment, thereby accepting the new conditions.

After hearing testimony from all three Elderberry principals, Charlean Marsh, and three expert witnesses, the trial court found in Elderberry's favor. The court determined (1) that Old Republic had not met its burden of proof on its affirmative defense of ratification; (2) that Old Republic's conduct was a substantial factor in causing Elderberry's inability to obtain alternative funding for the project, and (3) that

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[3] The bankruptcy proceeding was still pending at the time of trial.

Elderberry's damages were not limited to the cost of setting aside the deed of trust, but included the amounts Elderberry could have received from selling the 15 lots. Accordingly, the court awarded Elderberry $500,000 in damages. Old Republic timely filed its notice of appeal from the judgment.

Discussion

Old Republic acknowledges at the outset that it breached its duty to comply with the instructions from the parties to the transaction, since Marsh closed escrow without resolving the conflict between the instructions of Elderberry and Cedar Funding. The primary focus of Old Republic's argument on appeal is that it had no further duty than to comply with the instructions. Consequently, it was not required to advise Elderberry regarding the soundness of the deal or to suggest courses of action; nor did it have any duty to investigate Cedar Funding's ability to fully fund the loan, to "police Cedar Funding," or to report suspicious facts. Old Republic further disputes the trial court's finding that Marsh's conduct caused the harm suffered by Elderberry. "It was Cedar Funding, not Old Republic, that was the cause, and the only substantial cause, of Elderberry's financial collapse." Old Republic also briefly returns to the issue of ratification, suggesting that the court "set an unacceptably high standard" for proof of this defense. Finally, Old Republic challenges the amount of damages awarded to Elderberry.

1. Scope of Duty and Causation

Old Republic directs most of its energy on appeal to the argument that as escrow holder its duty was limited to complying with the escrow instructions it received, with no responsibility for reporting its suspicions or advising the parties to any transaction. Old Republic mischaracterizes Elderberry's position, however, and disregards the critical facts giving rise to its liability. The factual basis of Elderberry's argument at trial was not merely that Marsh breached her duty by prematurely recording the deed of trust without the requisite funds to disburse to Elderberry and despite inconsistent instructions; nor was it her failure to "police" Cedar Funding or give advice to Elderberry. In fact, she did

advise Elderberry: Marsh told Shingu and Underwood that they "had to" sign the amended statement and obtain the check directly from Cedar Funding, because "that's the way that Cedar Funding does business." It was this active misrepresentation, not a mere failure to investigate and disclose Cedar Funding's financial condition, that was the basis of Old Republic's liability for the damages suffered by Elderberry. The court also noted Marsh's affirmative misrepresentations concerning Cedar Funding's ability to fully fund the loan, while failing to inform Shingu and Underwood that Cedar Funding had not deposited the entire $1.6 million into escrow. The trial court thus found that Old Republic's conduct was a substantial cause of Elderberry's inability to obtain alternative funding for the project because of the cloud on the title. This was, as the court noted, a question for the trier of fact, whose finding must be upheld if supported by substantial evidence. (Cf. *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 785 [substantial evidence supported finding that negligence was substantial factor in death of plaintiff's husband]; *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 10 [substantial evidence test applied to jury findings of breach of contract and breach of fiduciary duty]; *Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1063-1064 [substantial factor test of causation applicable in breach of contract].)

Here the court's finding that Elderberry proved causation was supported by the testimony of Underwood and Darian Shingu. Underwood stated that after learning that Cedar Funding had no more funds to give Elderberry, he requested a list of investors, which he received almost three weeks later. The prospect of securing alternative funding was promising until Cedar Funding declared bankruptcy; at that point the $1.6 million second deed of trust was "clouded," and "all the potential investors said we don't want anything to do with it." The title, Darian Shingu explained, "was trashed at that point." Thus, the trial court properly acted in its role as trier of fact when it concluded that the misrepresentations and failures to disclose material information contributed to the

insurmountable obstacle Elderberry encountered in seeking alternative financing for the project.[4]

2. Ratification

A vigorously disputed issue at trial was whether Shingu had ratified the new terms by signing the amended closing statement after escrow closed. The trial court found that ratification had not occurred here, because Shingu was induced to sign the statement without "full knowledge of the facts, including the crucial fact that Cedar Funding did not have the money to fully fund the $1,600,000.00 construction loan." The court stated that it was Old Republic's burden to prove ratification by clear and convincing evidence; but it had not established this fact even by a preponderance of the evidence. Shingu and Underwood did, of course, know that $597,057.36 would not be paid to it through escrow; but they acceded to the amendment only because Marsh falsely represented to them that Cedar Funding had the money.

The trial court did not err in reaching this conclusion. "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.) It is true that an implied ratification may occur through the principal's conduct. "It is essential, however, that the act of adoption be *truly voluntary* in character. Moreover, there can be no adoption if the act, although voluntary, is done only because the purported principal is obligated to minimize his losses caused by the

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[4] By the same reasoning, we find unavailing Old Republic's assertion that the early recording of the deed of trust could not have been a cause of Elderberry's damages "as a matter of law." The trial court repeatedly emphasized that it was the combination of acts, including Marsh's misrepresentations, not merely the premature recording, that caused the harm Elderberry suffered.

agent's wrongful act [citation] *or because of duress or misrepresentation* by the agent." (*Ibid.*, italics added.)

Old Republic contends that the court "set an unacceptably high standard for ratification. It is not necessary that Elderberry know the entire business inner working of Cedar Funding. Instead, it is only necessary that Elderberry be aware that Cedar Funding has not lived up to its obligations." This straw-man premise ignores the reality of the situation in which Elderberry was placed. Elderberry never argued that it had to know the "entire business inner working[s]" of Cedar Funding; the problem it identified was that Shingu and Underwood signed the amended statement in reliance on Marsh's false representations that they could retrieve the entire disbursement directly from Cedar Funding and that their lender had deposited in escrow the entire $1.6 million it had committed to them. The trial court did not err in rejecting the affirmative defense of ratification based on the facts before it.

3. Damages

At trial the element of damages was litigated through the testimony of Underwood, as well as Elderberry's expert, John Nelson. Old Republic presented its defense expert, Jan Kleczewski. A licensed contractor as well as developer, Underwood described the process of obtaining approval and completion of all the improvements contemplated for the project. Based on his experience he believed that if Cedar Funding had been able to fund the entire loan in a timely fashion, the lots would have been completed and ready for inspection by the county in January 2008. The average selling price would have been $250,000, with a net profit of approximately $90,000 on each lot.

His estimate was based on several factors. The project was located on the side of a hill, with "beautiful views" of the Sierra and "great access" to the city of Fresno. Homes nearby were selling for between $700,000 and more than $1 million, and down the street was a five-star restaurant. Moreover, this was to be a gated community, "and people like that exclusivity and are willing to pay for it." A buyer could spend $250,000

per lot, erect a $500,000 house on it, and "have probably a million dollar asset when they're done." Underwood believed that timing was "very, very important"; because people liked to buy in that area during the spring, it was a "true benefit" to sell the lots as early in 2008 as possible.

John Nelson was a licensed real estate broker who had done business in Madera County for almost 30 years, many concerning land development projects. The court accepted his qualification as an expert in valuation of property in the area of Elderberry's project. Nelson evaluated a number of "pluses about the property": its access to the highway; the views each lot would afford; its proximity to shopping, goods and services, and recreation; its nature as a gated community (which was unique to the area); the "buildable" topography of the lots; and their potential to accommodate structures for boats or other "facilities."

Had the property been ready for sale by February 2008, the optimal time to market it would have been through the spring of that year. Nelson expressed "no doubt that we would have had them sold by June of 2008 if we would have [*sic*] been able to sell them." During that period the selling prices would have ranged from $225,000 to $275,000. Those figures took into account the softening of the market that had begun in early 2008. If they had been sold later, in August or September, they would have commanded in the "200, 210 range."

Jan Kleczewski was the owner and managing director of a firm that performed appraisals of commercial properties and residential subdivisions in Northern California. He had not personally conducted any appraisals in the area of Elderberry's project. The firm had appraised a couple of hotels in Madera County, but none of those had been of "raw but subdividable" land. Over Elderberry's objection the court qualified Kleczewski as an expert in the area of "real estate evaluations generally," though not specifically in the Oakhurst area. Assisted by two members of his staff, he visited the site and

researched comparable properties. His estimate of the fair market value of the Elderberry lots in the spring of 2008 was $110,000.

Old Republic contends that damages claimed by Elderberry were fatally speculative, because they were "based on the future success of the untried venture" and based on insufficient evidence. Old Republic discounts the testimony of Nelson, which conflicted with the analysis of Kleczewski. To accept Old Republic's argument, however, would be to reweigh the evidence, in violation of settled standards of review. "Expert testimony may, of course, adequately support a damages award, even when it conflicts with other expert or lay testimony. It is the function of the trier of fact to assess the credibility and expertise of a witness offered as an expert." (*Santa Clarita Water Co. v. Lyons* (1984) 161 Cal.App.3d 450, 463-464.) Here the trial court expressly found Nelson's valuation to be more credible than Kleczewski's. Nelson, the court pointed out, had 30 years of real estate experience specific to Madera County and had provided a detailed analysis of "market comparables." Kleczewski, on the other hand, had used comparables that were not gated residential communities or ones with security. He also "lacked key experience in listing, marketing and selling subdivided lots in Madera [County] and relied on local brokers to fill in those blanks for him. None of those brokers testified at trial."

Relying on Underwood's and Nelson's testimony, the court calculated damages based on market conditions during 2008. It determined that five lots could have been sold at the June 2008 price of $250,000, five for $200,000, and the remaining five after the market decline, at an average price of $150,000. Nothing in the court's explanation indicates faulty reasoning or a lack of substantial evidence to support its conclusion. Damages of $500,000 were therefore properly awarded to Elderberry.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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MIHARA, J.